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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1898.

No. 292.

HOSEA B. TULLIS

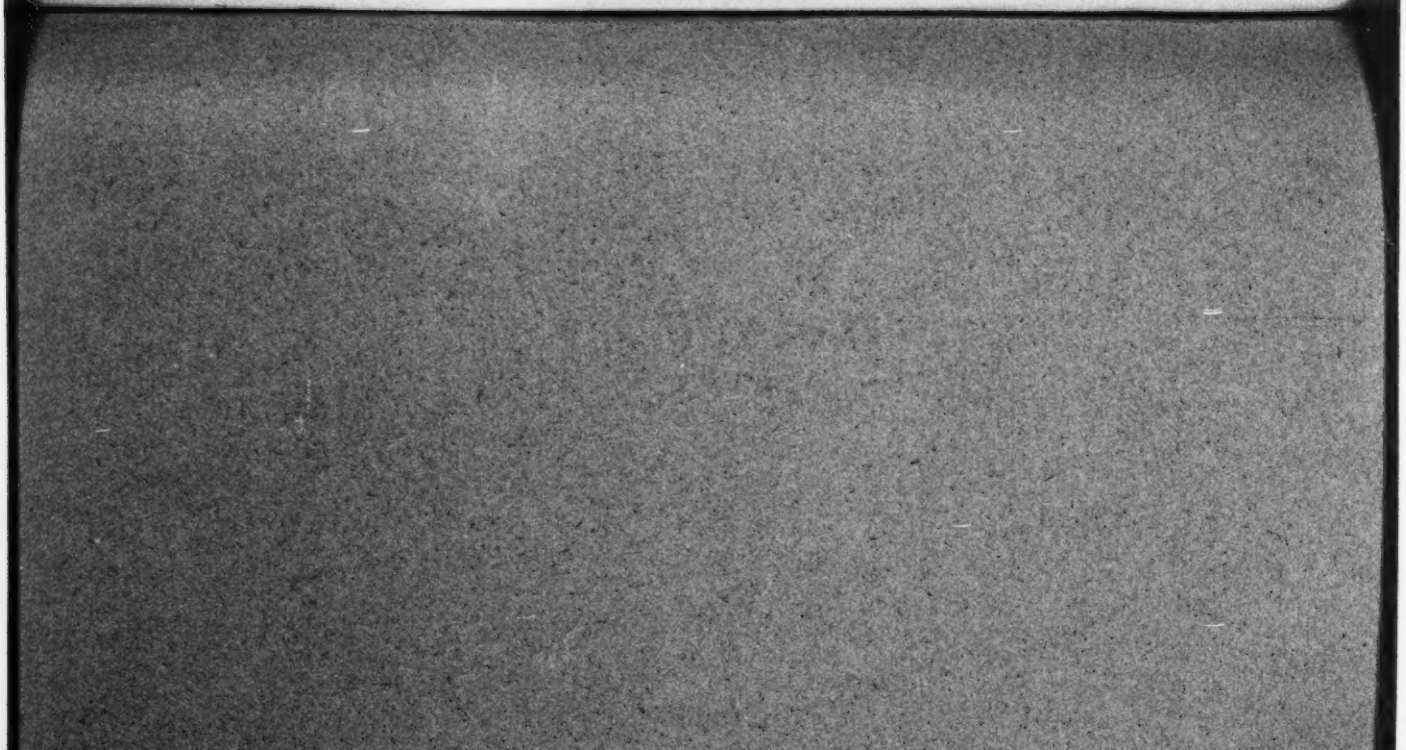
vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

BRIEF UPON PETITION TO HAVE ENTIRE CASE BROUGHT FROM CIRCUIT COURT OF APPEALS TO THE SUPREME COURT.

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The judges of the Circuit Court of Appeals have certified to this Court for decision the question whether the act, known as the Employers' Liability Act of the State of Indiana, is in violation of the Fourteenth Amendment of the Federal Constitution. The defendant in error has filed in this court its petition asking that the entire case be brought to this court for decision, in order that it may have the opinion of this Court as to whether the bill of exceptions was filed, and the writ of error sued out, in due time.

To the end that this Court may have all questions fully presented, the defendant in error has printed and filed with its petition a full transcript of the record in the Circuit Court and in the Circuit Court of Appeals. The petition, the record in the Circuit Court, and the record in the Circuit Court of Appeals, are under the same cover and in the order named. In the petition (Transcript, p. iii) it appears:

First. That the verdict in the case was rendered on the 20th day of November, 1896, for the defendant, being at the November Term, 1896.

Second. That two days later, on defendant's motion, judgment was rendered on the verdict for costs.

Third. That on the 26th day of April, 1897, over five months thereafter, and almost at the end of the term, plaintiff, without calling the attention of the Court to the same, filed in the clerk's office his motion for a new trial.

Fourth. That on the first day of June, 1897, at the next term, said motion was overruled by the Court, plaintiff excepting, and sixty days were given in which to file his bill of exceptions.

The bill of exceptions so far as pertinent appears at pages iii, iv and v of the petition, and shows:

First. That there is no rule of court prescribing the time within which mot ons for new trial must be made, nor is there any rule, custom or practice as to the time after verdict for the rendition of judgment thereon.

Second. That there is a rule of court requiring motions to be supported by written or printed briefs within fifteen days and requiring the adverse party to file briefs within a like time.

Third. That plaintiff did nothing after the rendition of the verdict, November 20th, until April 26th, when the motion for a new trial with a brief was filed and a copy thereof sent to defendant's attorneys. That the filing of this motion was not called to the attention of the Court until the 26th day of May, 1897, after the term of court at which the verdict was rendered had expired. That at that time the matter of the motion was brought to the attention of the judge by the clerk bringing to him in chambers the motion and the briefs for and against the same. That on June 1st the motion was overruled, plaintiff excepted, and was allowed sixty days in which to file his bill; the judge, however, stating at the time to plaintiff's attorney that he thought the bill would be of no value to raise any question of error.

Fourth. That shortly afterwards plaintiff's attorney prepared a bill of exceptions and served a copy of the same on defendant's attorneys. That defendant's attorneys objected to the signing of the bill upon two grounds:

(1) Because it was too late and the Court had no power to sign the bill.

(2) Because it was too late to sue out a writ of error, more than six months having elapsed since the entry of judgment.

The record, p. 7 (C. C. A.), further shows that defendant in due time in the Circuit Court of Appeals moved to dismiss the writ of error and strike out the bill of exceptions because neither was taken in due time. But while these motions have not been formally acted upon by the Circuit Court of Appeals, the certificate upon the constitutional question sent to this court shows that these motions have not been sustained, but that the Circuit Court of Appeals has entertained jurisdiction to decide the case upon the merits.

## ARGUMENT.

### I.

The statute of limitations as to such appeals and writs of error in the Judiciary Act of 1891 reads as follows:

> "Section 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this Act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."
>
> 1st Supplement R. S., page 904.

We are aware that it has been held that when a motion for a new trial at law, or a petition for a rehearing in chancery, has been seasonably presented to and entertained by the Court, the effect of such presentation and consideration is to suspend the running of the limitation pending such consideration.

Our contention here, however, is that in this case the Circuit Court of Appeals for the Seventh Circuit has gone further than any other court has ever gone, further than the decisions of this Court warrant; in fact, has gone so far as practically to amend Section 11 and make the limitation, at the option of the appealing party and with the permission of the trial court, twelve months or more instead of six months. If a verdict and judgment rendered the first week of the November term may be suspended by a motion for a

new trial filed, though not called to the attention of the Court, in the last week of the term, and such motion relating back, is operative to suspend the statute of limitations during all of the time before it was filed, it of course would be operative also to suspend such limitation for any length of time before it was finally passed upon after its filing, with the result that the limitation as before stated is practically what the party and the judge choose to make it. It is submitted, that, neither in the decisions of this Court nor of the other Circuit Courts of Appeals is there any warrant for such decision.

It is submitted that in all of the decisions which hold that the motion for a new trial or a petition for a rehearing suspends the operation of the statute an element is named which is entirely wanting here, namely, a *seasonable* filing and *presentation* of such motion or petition, and the entertainment thereof by the Court during the trial term.

And right here we find the warrant for presenting this petition to this Court. Nothing can be more important in the administration of the federal courts than that the practice in a matter of this kind shall be uniform, and shall not be dependent upon the varying circumstances of each case, or the varying views of the judges sitting in the various Circuit Courts of Appeals. With nine courts of last resort making and publishing federal decisions, a failure by this Court to exercise, in the interest of uniformity, freely and vigorously, the power reserved by the statute to bring cases here involving conflicting views of practice, would soon result in disastrous confusion. Doubtless it was the apprehension of such a result that caused Congress to give this Court power by certiorari to exercise a salutary supervision over all decisions in the Circuit Courts of Appeals.

As an illustration of the necessity for this Court to maintain a strict supervision of the decisions of the Circuit Courts of Appeals, we call attention to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of the Western Union Telegraph Company v. Baker, 85 Fed. Rep. 690. In that case the question was whether exceptions to the instructions given by the Court to the jury were taken in due time. It was, as in the case at bar, strictly a question of practice. In the opinion, page 691, it is said:

"It is stated in the record that all the exceptions were taken in writing after the jury had retired to deliberate upon their verdict, *and before the rendition of their verdict*, for the reason that this court refused in all cases to allow exceptions to be taken in the presence of the jury, *and would not have allowed exceptions to be taken in this case had it been asked*, but no request was made by either party to take such exceptions before the jury retired."

In other words, the record showed that the exceptions could not be taken before the retirement of the jury, because the trial court would not permit it, and the taking of them after the retirement of the jury was useless because the Circuit Court of Appeals refused to consider them. Elsewhere in the same opinion it is stated that "this position is sustained we believe by every court to which the question has been presented," and a number of decisions of Circuit Courts of Appeals are cited, some of which apparently do, and others do not, sustain that decision.

One of the cases so cited and which does apparently sustain the decision is Bracken v. Union Pacific, etc., 56 Fed. Rep. 447, a decision by the Circuit Court of Appeals of the Eighth Circuit. In that case, on page 450, it is said:

"The bill of exceptions states that the defendant's attorney gave notice in court that he desired to have exceptions noted to the charge of the court and to certain portions of the same, but not in the presence of the jury nor until after the jury had retired to consider the verdict. Exceptions taken to the charge of the court after the jury had retired to consider their verdict will not be considered by this court. Price v. Pankhurst, 53 Fed. Rep. 312."

But with all due respect, it is submitted that in neither of these cases is the rule correctly stated. Nor has any such statement the sanction of this Court, nor does the reason upon which the rule is based require or justify such a construction of the same. What is this reason? It is simply that, if errors are claimed in the instructions, they may be drawn to the attention of the Court before it is too late for the trial Court to correct the same. In other words the rule is that the exceptions must be taken before the verdict is returned, as until that time the Court may recall the jury and correct his errors.

Accordingly, in the recent case of Coffin v. The United States, 156 U. S. 432, where the exceptions were not taken before the jury retired, although it was stated in general terms that such exceptions were desired, and where the same were in fact not taken for six

hours after the jury originally retired, it being the understanding of Court and counsel at the time of such retirement that the exceptions might be taken later, it was held that they were properly taken. This ruling was made by this Court after a full citation of the decisions not only of this Court but of the State and the English courts. And it expresses beyond doubt the correct rule, namely, that the exception must be taken at the trial and before the verdict is rendered, and while it is not too late for the trial Court to correct its error. The rule and the reason for it are nowhere better stated than in Jones v. Van Patten, 3 Ind. 111.

This is but a single illustration taken at random, showing the absolute necessity of supervision by this Court in these matters of practice, to prevent conflicting decisions and the denial of their rights to ligitants.

Coming back now directly to the question of practice involved in the case at bar, we contend:

First. Here, under any correct practice, no motion was made or presented during the term at all. The meaning of the word "motion" implies something more and different from the mere filing of a paper in the clerk's office. A filing of the application in the clerk's office without bringing it to the attention of the Court during the term counts for nothing.

Emison Trustee v. Shepard, 121 Ind. 184;
Railsback v. Walke, 81 Ind. 409;
Jacquay v. Hartzell, 1 Ind. App. 500;
Deering v. Armstrong (Ind. App.), 48 N. E. Rep. 1045.

The last cited case was tried by a special judge, the regular judge being disqualified. The special judge was absent when the verdict was returned and during all the balance of the trial term. The application for a new trial was filed with the clerk during the term. But it was held that these facts did not excuse the nonpresentation of the motion to the Court during the term, and the application was held not to have been properly made.

It is, we think, entirely clear that in no proper sense was the motion made in this case during the term. The purpose of a motion is to induce action by the Court, and the mere filing of a paper in the clerk's office does not at all serve such purpose. It must be kept always in mind that not only does it not appear by the bill of excep-

tions that the motion for a new trial was brought to the attention of the Court, or that the same was taken into consideration by the Court, but the contrary of these facts does appear. The Court knew absolutely nothing about any such motion being filed until after the term had expired and after more than six months had elapsed after the rendition of the judgment.

Second. As before stated, the decisions by this Court make the seasonable filing and presentation and the taking cognizance of the motion an essential fact.

The leading case on this subject in this court is Brockett v. Brockett, 2 How. 238, wherein Mr. Justice Story says:

"*During the same term*, a petition was filed by the defendants on the 26th day of the same month (May), to have the final decree opened for certain purposes; *and the court took cognizance of* the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing, and the court then refused to open the final decree; and from this refusal, as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

"Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court, and it did not take effect until the 9th of June, and that the appeal was duly taken, and the appeal bond given within ten days from this last period."

That is, the petition for rehearing filed and taken into consideration by the Court and action had at the same term suspended the operation of the decree. Suppose that in that case the Court had not heard of the petition to open the decree during the term?

So, in Texas & Pacific Railway Company v. Murphy, 111 U. S. 488, which is rested upon the authority of Brockett's case, the same element which is wanting here was held to be controlling. Thus it is there said:

"In Brockett v. Brockett, 2 How. 238, it was decided that a petition for rehearing, presented in due season and *entertained by the court*, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on

its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made. This presumption has not been overcome."

In the case at bar, on the contrary, it does appear that the motion for a new trial was not seasonably filed to give the Court control of the judgment, the same being filed five months and three days after judgment, and it does affirmatively appear that the matter was never brought to the attention of the Court until after the term had expired.

It is to be borne in mind that action on a motion for a new trial in the United States courts rests entirely in the discretion of those courts, and it can not be said that such a motion filed in the last month of a six months' term of court, and nearly six months after the judgment, is seasonably filed, to say nothing of the fact that it is not brought to the attention of the Court at all during the term.

In Aspen Mining Co. v. Billings, 150 U. S., on page 36, it is said:

"The decree dismissing complainant's bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

Citing

Brockett's case,
Texas & Pacific case, and
Memphis v. Brown, 94 U. S. 715.

This matter of seasonably filing the motion and the entertainment of the same at the term by the Court is a feature in all of the cases. In addition to cases cited, see, also, Voorhees case, 151 U. S. 135.

Memphis v. Brown also rests upon the authority of Brockett v. Brockett, and goes no further than that decision.

Nor do the cases cited from the Circuit Court of Appeals and Circuit Courts go any further.

Thus in Louisville Trust Co. v. Stockton, 72 Fed. Rep. 1, Circuit Court of Appeals, Fifth Circuit, it is said by Judge Pardee:

"We have examined the record and considered the argument of counsel. The judgment in the court below was rendered on the *1st day of May, '95*, and *thereupon* a motion for a new trial was entered which was overruled on the *2d day of June '95*. The citation directing the defendant in error to answer in this court was signed and issued on the 9th day of November, 1895, more than six months after the entry of the judgment sought to be reviewed, but within six months from the date when the motion for a new trial was overruled. The time limited for suing out a writ of error does not begin to run while there is a motion for a new trial pending. Railway Co. v. Murphy, 111 U. S. 488."

In that case the word "thereupon" indicates that the motion for a new trial was entered on the very day (certainly very shortly after) the judgment was entered, and it was overruled at the same term a month later. It is there said that the time limited for suing out a writ of error does not begin to run while there is a motion for a new trial *pending*, but in the case at bar for five months and three days there was no motion for a new trial pending. Was the limitation of the statute suspended during all that time? To say so is to say that a party against whom a judgment has been rendered on the first or second day of the term, where the term, as here, runs for six months, may by his own act, and without calling the same to the attention of the Court at all, by filing a motion for a new trial on the last day of the six months, make the limitation of the statute, as to him, a year, instead of six months, as Congress has provided.

In Andrews v. Thum, 72 Fed. Rep. 290, in the Circuit Court of Appeals of the First Circuit, a final decree appears to have been entered on May 13 and a petition for a rehearing to have been overruled on the 23d of June following. The appeal was within six months from the latter date. The petition for rehearing appears to have been promptly filed, and overruled at the same term at which the original decree was entered.

So in Alexander v. United States, 57 Fed. Rep. 828, on page 831, Judge Gilbert, speaking for the Circuit Court of Appeals of the Ninth Circuit, says:

"The question arises whether the six months within which to sue out the writ, as limited by section 11 of the act creating the Circuit Court of Appeals, had expired on April 2, 1892. We are of the opinion that it had not, and that the judgment of the territorial court was suspended by virtue of the motion for a new trial, which had been filed *in due time*, and *which had been entertained* by the court, and that it was so suspended until the final disposition of that motion."

So in Rutherford v. Insurance Co., 1 Fed. Rep. 456, and in Brown v. Evans, 18 Fed. Rep. 56—in fact, in every case where it has been held that the motion for a new trial or the petition for a rehearing operates to suspend the limitation of the statute, it has appeared in the record that the motion or petition was not merely *seasonably* filed in the clerk's office, but that it was actually brought to the *attention* of, and was taken into *consideration* by, the Court at the same term.

Thus in the case of Altenburg v. Grant, 83 Fed. Rep. 980, decided by the Circuit Court of Appeals of the Sixth Circuit, it appears that the verdict was rendered November 12th. Judgment was entered at once upon the verdict. November 15th, following, plaintiff filed a motion for a new trial. This motion was denied December 17th following. On June 15th the writ of error was allowed. It thus appears that in that case the motion for a new trial was filed within three days after the verdict, was entertained by the Court, and was finally disposed of within thirty-five days from the date of the verdict. The writ of error was allowed within six months after the motion for a new trial was overruled. Surely that case is no authority for the contention that a motion for a new trial, filed almost six months after the judgment, and never brought to the attention of the Court until considerably more than six months, and at the next term of the court, is operative to suspend the running of the limitation during all that time.

Woods v. Lindvall, 48 Fed. Rep. 73, decided by the Circuit Court of Appeals of the Eighth Circuit, is no more helpful to plaintiff in error. In that case, on the day following the verdict and judgment, defendants asked and obtained a stay of execution for forty-two days, to enable them to file a petition for a new trial, and the petition was filed within the forty-two days. There was a case where the motion or petition for a new trial was duly filed within a reasonable time by the permission of the Court, and was entertained by the Court at the same term.

In his brief on the motion to dismiss this writ in the Circuit Court of Appeals, counsel for plaintiff in error cited a dozen or more decisions by this Court and the Circuit Courts of Appeals, but after a careful examination of all, we assert that none of them goes beyond the Brockett case; and that in every one it appears that the

motion was not only seasonably filed, but was brought to, and entertained by, the Court during the trial term.

So that unless this Court is prepared to hold that the expression so frequently used in the decisions, "seasonably filed and entertained by the Court," means absolutely nothing, it would seem clear that the writ of error in the case at bar was not sued out in due time.

It must be kept in mind that the motion for a new trial in the federal practice is addressed entirely to the discretion of the Court; that error cannot be predicated of any action thereon, and that being thus discretionary, it can not have any possible effect, except as brought to the attention of the Court and within the purview of that discretion. To argue that an appeal to discretion of one who knows nothing of such appeal, is operative for any purpose, is a contradiction in terms. As no ultimate rights depend on the motion, it would be no legal wrong were the Court to refuse to permit the motion to be filed, or strike it from the files, if placed there without leave. It is, and can therefore be, as the decisions above indicate, effective only when filed by leave or entertained by the Court. Until such action by the Court, it counts for nothing.

The writ of error is purely statutory and the Appellate Court gets jurisdiction only by a strict pursuance of the statute.

Stevens v. Clark, 62 Fed. Rep. 321.

So stringent is this rule that, after six months, parties can not give jurisdiction by consent.

Dodson v. Fletcher, 79 Fed. Rep. 129.

It is worthy of note that the terms of the U. S. Circuit Court for Indiana are six months' terms, while in our State courts terms occur monthly, or at most not more than two or three months apart. Is a party to be permitted to lie by for six months, saying and doing nothing, and, without the knowledge or consent of the Court, to stay the operation of an act of Congress during all that time? Such is the effect of the decision of the Circuit Court of Appeals in this case.

## II.

It is equally clear that the motion for a new trial can not help to connect this bill of exceptions with the record, and the argument rests upon the same reasoning and line of decisions as that touching the writ of error.

The United States statute, Section 914, Revised Statutes, adopting the State practice in common law cases, has no application to a motion for a new trial or bills of exceptions.

Chateaugay Iron Co., 128 U. S. 544;
Prichard v. Budd, 76 Fed. Rep. 710;
Minneapolis v. Emerson, 80 Fed. Rep. 993;
Rhodes v. United States, 79 Fed. Rep. 740.

By the same decisions it is shown that he action of the trial Court on a motion for a new trial is purely discretionary and not reviewable on writ of error.

This being so, it is not seen how action on such motion can enable a court, at a term subsequent to that of the trial, verdict and judgment, to bring forward and embody in a bill exceptions taken at the trial term, no time for that purpose having been granted at such trial term.

The rule is that a bill of exceptions can only be signed at the term at which the exceptions are taken and judgment rendered, unless the right is reserved to the Court by a special order or a rule of court to sign it afterwards.

Muller v. Ehlers, 91 U. S. 249;
Richmond, etc., v. McGee, 50 Fed. Rep. 906;
N. Y. & N. E. R. R. v. Hyde, 56 Fed. Rep. 188.

In the Richmond case, on page 907, Chief Justice Fuller, speaking for the Circuit Court of Appeals, says:

"From the foregoing statement it will be seen that no bill of exceptions was presented to the trial judge for signature, and signed by him during the term at which the trial was had and judgment rendered, nor within any extension of time for that purpose granted by him and entered of record, or consented to by counsel. This being so, the certificate of February 20th is entirely unavailing, even if in itself sufficient if executed in due time. The case comes clearly within Muller v. Ehlers, 91 U. S. 249. See, also, Jones v. Grover & Baker S. M. Co., 131 U. S. Appendix, cl.;

United States v. Carey, 110 U. S. 51, 3 Sup. Ct. Rep. 424; Express Co. v. Malin, 132 U. S. 531, 10 Sup. Ct. Rep. 166; Glaspell v. Railroad Co., 144 U. S. 211, 12 Sup. Ct. Rep. 593. In Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. Rep. 1102, the delay was attributable to the judge after the party excepting had done all that he could to procure the settlement of and signature to the bill, while here no bill of exceptions was ever presented, nor was the paper relied on as such tendered to the judge until after the time within which he could act had expired."

In the case of 56 Fed. Rep., on page 191, Judge Putnam quotes from Justice Gray, speaking for the Supreme Court in Bank v. Eldred, 143 U. S. 293, as follows:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. *After the term has expired, without* the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

Plaintiff in error, however, while constrained to admit that the rule of practice on this subject is against him, contends that when a motion for a new trial has been filed at the trial term, an exception to the rule prevails. He cites to this point two cases in the Eighth Circuit Court of Appeals.

Woods v. Lindvall, 48 Fed. Rep. 73, and
M., K. & T. R. R. v. Russell, 60 Fed. Rep. 501.

But these cases do not go far enough to save this bill of exceptions.

They involve three elements, neither one of which is present here.

First. The motion must have been filed at the trial term *by leave of Court.*

Second. The consideration thereof must have been by the Court postponed to the subsequent term.

Third. The practice in the trial court must have been to render judgment immediately on return of verdict, and to postpone settling bill of exceptions till after action on that motion.

Here, as we have seen, the Court never heard of the motion during the trial term; of course the Court did not postpone the hearing thereon, and not only is there no showing of such a practice to render judgment on verdicts immediately, and to postpone settling the bill of exceptions till the motion is disposed of at a subsequent term, but no such showing could be made, for there is no such practice in this circuit.

The result is that the case—M., K. & T. R. R. v. Russell, 60 Fed. Rep. 501—is one of the strongest authorities against the contention of plaintiff in error.

In order for a motion for a new trial to extend the time for filing a bill of exceptions, that motion must have been seasonably filed, brought to the attention of the Court, and entertained by the Court, and all that within the trial term. When thus seasonably filed and entertained, it is not doubted that it may be operative to suspend the running of time till it is decided. So far the cases cited by counsel for plaintiff in error go, and none of them go further. This is the rule in Brockett's case, touching the writ of error which rests on the same principle. Further than this the decisions do not go, and can not go, without making the will of the litigant, without any consideration or action by the Court, within broad limits, the measure of the limitation in each case.

Our contention that a motion for a new trial counts for nothing unless seasonably filed and entertained by the Court is supported by the cases cited for plaintiff in error below.

> Adrian Furniture, Etc., Co. v. Lenawee Circuit Judge, 52 N. W. Rep. 615.

The opinion in that case in full is as follows:

"A verdict was rendered and judgment entered against relator, May 29, 1891. Time was granted to the relator in which to move for a new trial, and subsequently the time was extended for that purpose. Within the time granted a motion for a new trial was made, which was afterwards heard, but said motion was not finally disposed of and determined until May 12, 1892. After the motion for a new trial was determined, relator moved the Court for time within which to settle a bill of exceptions, but the Court denied the motion, upon the ground that the term in which the judgment was entered having passed, and no extension of time having been obtained, the Court had no power or discretion in the matter. The rule is well established that a bill of exceptions must be settled, or the time to settle it must be extended, in the first instance during the term in

which the judgment was entered. Cleveland v. Stein, 14 Mich. 333. In that case, however, no motion for a new trial had been made, and the judgment became final for all purposes at the end of the term. But where a motion for a new trial is made it would be useless labor to prepare a bill of exceptions in advance of the determination of that motion. The writ of error is the dernier resort, and judgment can not be said to be final so as to deprive the trial Court of the power to act in the premises during the term in which the Court disposes of the pending motion. In case, therefore, no motion for a new trial is made, the term within which a bill of exceptions must be settled, or the time extended in the first instance, is that within which the judgment is entered; but where a motion for a new trial is made within the time allowed by rule, or within the time allowed by the Court, or by leave of the Court, the term within which such bill of exceptions must be settled or the time extended must be deemed to be that in which such motion is finally determined. Greeley v. Percival, 21 Fla. 538; Hearson v. Graudine, 87 Ill. 116; People v. Gary, 105 Ill. 264. The same question came before this Court in Brotherton Iron Min. Co. v. Gogebic, and was determined in January, 1889, in accordance with the foregoing, but no opinion was filed. The writ must issue as prayed, commanding the Court to fix a time, within its discretion, within which a bill of exceptions may be settled, and the time for issuing a writ of error in said matter will be extended until November 29, 1892."

It will be noticed that the other State cases from Florida and Illinois cited for plaintiff in error below are the cases cited in this opinion of the Michigan court. We are quite content to leave for decision, without comment, the question whether that opinion furnishes any sanction for the contention that a motion for a new trial, filed without leave or notice to the Court and between five and six months after the judgment and never brought to the attention of the Court until the next term, is operative to extend the time for filing a bill of exceptions.

So in the Missouri cases cited, Riddlesbarger v. McDaniels, 38 Mo. 139, and Givens v. Van Studdiford, 86 Mo. 149, and in the Illinois cases, Hearson v. Graudine, 87 Ill. 116, and People v. Gary, 105 Ill. 264, it is distinctly shown that in each case the motion for a new trial was made in due time and called to the attention of and entertained by the Court at the trial term. The Florida case, Greeley v. Percival, 21 Fla. 538, cited for plaintiff in error, we have not at hand.

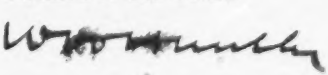
With reference to Talbott v. Press Company, 80 Fed. Rep. 567, in which Judge Lacombe at Circuit held that it was competent for the trial court, after the lapse of the term and long after the expiration of the time originally granted in which to file a bill of exceptions,

to make a *nunc pro tunc* entry making another grant of time for filing of such bill, we have only to say, that, if such a power resides in the Circuit Court, it is not seen that the decisions by this Court and the rules it establishes as to such questions are of much value; for if that decision is correct, the Circuit Judge has a "dispensing power" (so far as such rules and decisions are concerned) as broad as any that was ever claimed by a Stuart King. If such a discretion resides in the judges it would seem that this Court was mistaken when it announced that this is "a government of laws and not of men."

In conclusion, we submit that there is in this record no fact or circumstance to take the case out of the general rule that a bill of exceptions can not be signed or filed after the expiration of the trial term, except when an order is made extending the time.

And we submit, moreover, that this rule has been established as the result of long practice, because found to be necessary and convenient for avoiding controversies in settling such bills; and, as the Courts well say, it ought not to be disregarded, except where special leave is granted extending the time, or where authorized by a rule of court or a special practice so well settled as to amount to a rule of court. It is a mistake to suppose that, by the use of stenographers, the need of promptness in settling bills of exceptions is past. On the contrary, this very case is an illustration of the fact that such bills are made up independently in large measure of the stenographer's notes, from memory, as to what the facts were and what the evidence tends to prove. Moreover, we suppose it will hardly be insisted that the rule as to the time of taking a bill of exceptions is to be one thing in a case where there happens to be a stenographer and another where there is none.

We, therefore, ask that this Court will order this case entire to be certified to this Court.



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No. 292.

Brf. of Miller & Elam for D.

Office Supreme Court U. S.
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Clerk.

Filed Feb. 23, 1899.

# Supreme Court of the United States.

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS,

v.

LAKE ERIE & WESTERN RAILROAD COMPANY.

## BRIEF FOR DEFENDANT IN ERROR.

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IN THE

# Supreme Court of the United States.

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS,

*v.*

LAKE ERIE & WESTERN RAILROAD COMPANY.

## BRIEF FOR DEFENDANT IN ERROR.

The Certificate of the Judges of the Circuit Court of Appeals of the Seventh Circuit is as follows:

"CERTIFICATE TO THE SUPREME COURT.

*Before Woods, Jenkins and Showalter, Circuit Judges.*

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow-servant, for which the defendant in error is alleged to be responsible by force of an

Act of the Legislature of Indiana, approved by the Governor of the State, March 4, 1893. The first section of the Act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First*. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second*. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third*. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth*. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to the Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, revision of 1894, paragraphs 7083 to 7087, inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois, owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana.

It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid or violates the fourteenth amendment of the Constitution of the United States the Court hereby orders certified and submitted to the Supreme Court of the United States for its decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER."

We contend that the statute of the State of Indiana therein set forth is obnoxious to the fourteenth amendment to the Constitution of the United States, and invalid upon two principal grounds.

*First.* The statute is invalid in that it denies to corporations the equal protection of the laws, it being well settled that corporations are persons within the meaning of the fourteenth amendment.

*Gulf, etc., Co.* v. *Ellis*, 165 U. S. 154.

It makes corporations liable simply because they are corporations. It makes them liable in cases where under precisely the same circumstances and conditions, individuals and partnerships would not be liable. It is a classification of employers—not of employments, of those who do—not of what is done.

*Second.* If it be contended, as the Supreme Court of Indiana has held, that the statute may be valid as to railroad corporations, though it may be invalid as to other corporations, then we say it is invalid as to railroad corporations, because it discriminates against railroad corporations in that it makes such corporations liable for damages in cases where, under precisely the same

circumstances and conditions, employers who are individuals or partnerships, or other corporations, would not be liable.

In each case it is submitted that the statute is fatally infirm in that it makes liability or non-liability depend upon an arbitrary and not a reasonable classification.

I.

As to the first question. The statute by its terms applies to all corporations, but does not apply to individuals or partnerships conducting the same business.

It is not only well settled that a corporation is a person within the meaning of the fourteenth amendment, but it is equally well settled that any legislation based on classification must rest on a reasonable classification, a classification having a just and proper relation to the subject-matter.

*Gulf, etc., Co.* v. *Ellis, supra,* page 155.

This rule and the reasons for it are most cogently stated and enforced by Chief Justice Beasley in the *State ex rel* v. *Hammer,* 42 N. J. L 435, where it is said:

"But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

The decisions of Courts, state and federal, are uniform in support of this proposition that classification, in order to be valid classification, must have reference to the subject-matter and not be merely arbitrary.

*Commonwealth* v. *Patton,* 88 Pa. St. 288;
*Edmonds* v. *Herbrandson,* 50 N. W. Rep. 970;
*State ex rel* v. *Mitchell,* 31 O. St. 592;
*People* v. *The Board,* 43 N. Y. 10.

This proposition has been repeatedly enforced in the consideration of statutes of this character.

*Smith* v. *Louisville & Nashville Railroad Co.*, 75 Ala. 449, was an action brought under a statute, which the Court held to be unconstitutional, upon the ground that it discriminated between corporations and private associations and other persons, and therefore denied to the former the equal protection of the law. This is the statute:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess."

Stone, J., said:

"Is the act copied above constitutional? It will be observed that under the statute, the action lies only against certain classes; corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers and agents, may cause the death of a minor child by the wrongful act or ommission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law, and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or, if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of the business, and the wrongful act or omission of the agent be, in each case, the same. How this will work will readily suggest itself. If the employer, being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act, by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more own the business, and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?"

The Court closes its opinion with the following observation:

"We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion." (P. 452.)

In *Soon Hing* v. *Crowley*, 113 U. S. 703, it was held that:

"Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws."

Mr. Justice Field, delivering the opinion, said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions." (113 U. S. 709.)

In *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U S. 150, a statute of Texas which singled out railway corporations, and made them alone liable for attorney's fees for failing to pay claims of a certain class, was held to contravene the fourteenth amendment, on the ground that it denied to railway companies the equal protection of the law. We ask the attention of the Court to the cases in State Courts referred to in the opinion of Mr. Justice Brewer (pp. 163-165), "in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right." He said, quoting with approval the language of Black, J., in *State* v. *Loomis*, 115 Mo. 307, 314:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." (165 U. S. 155, 156.)

Again:

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids

this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." (pp. 159, 160.)

Again:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

(Page 165.)

In *State ex rel* v. *Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112, the Court held unconstitutional an Act prohibiting the emission of dense smoke within the limits of a city, upon the ground that it excepted "manufacturing establishments using the entire product of combustion, and the heat, power and light produced thereby, where they are generated or within a radius of three hundred feet therefrom." The Court said:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged,

or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable."

(Pp. 240, 241.)

The objection to the statute at bar is that suggested by Gilfillan, C. J., in *Lavallee* v. *St. Paul, M. & M. Ry. Co.*, 40 Minn. 249; 41 N. W. 974, that it makes a classification based "not on the character of the employment, nor of the dangers to which the employes are exposed, but on the character only of the employers. We can see why the employers' liability should be greater when the business is that of operating a railroad, but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same."

Viewed from the standpoint of the servant, the statute gives to those who are in the employ of corporations rights which it denies to those who are in the employ of individuals, co-partnerships, or joint stock companies, although they may be carrying on the same business under similar circumstances.

In *Deppe* v. *Railroad Co.*, 36 Iowa, 52, 55, the Court puts this illustration:

"Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the railroad employe can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation."

In *Johnson* v. *St. Paul & D. Ry. Co.*, 43 Minn. 222, 45 N. W 156, the Court said:

"If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not

be established for railway companies, merely as such, and another rule for other employes, under like circumstances and conditions, unless upon the theory suggested in *Railway Co.* v. *Mackey*, 127 U. S. 205, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,'—a proposition which, as thus broadly stated, that Court, in view of its later utterances, could hardly have intended to announce. Indeed, the particular question now under consideration was not before the Court, and, presumably, was not in mind. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers, as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists.''

The statutes involved in the three preceding cases were held to be constitutional because limited to the hazardous employments of railroads; we quote the opinions to show the tests that were applied to accomplish that result. The application of the same tests to the Indiana statute demonstrates its invalidity.

There are numerous statutes of Indiana providing for the organization of corporations. By reference to a single one, popularly known as "The Manufacturers' and Miners' Act," it will be seen that corporations may do almost anything in the way of business that natural persons may.

R. S. 1894, Burns, Section 5051.

There, in a single section, the formation of corporations for the purposes of carrying on any kind of manufacturing, mining, mechanical or chemical business, or to furnish motive power therefor, or for organizing water companies, stock yards and transit companies, elevator companies, buying and selling dry goods, carpets, boots, shoes, millinery goods, fancy goods or jewelry, is authorized. As before stated, under other statutes a very large number of corporations are provided for, such as banks, railroad companies, street railroad companies, gas companies, pipe

line companies, voluntary associations or corporations; in short, as before stated, under the legislation of Indiana there is scarcely any business that can be transacted by an individual or partnership that is not authorized to be transacted by corporations. Under these circumstances, and in view of the fact that such corporations are persons within the purview of the fourteenth amendment, it is almost impossible to believe that such a statute as the one under consideration can be held valid.

By way of illustration, we may say that we have in the City of Indianapolis two very large establishments dealing in dry goods and general merchandise, one of them a corporation, the other a partnership. Each of them occupies a building with many floors reached by passenger elevators. Can any one give a good reason why the corporation shall be held liable to an employe operating one of these elevators because it is a corporation, while the partnership, for a like accident under precisely like circumstances, would not be liable?

So we have factories and machine shops operated by corporations, and others of the same character doing the same kind of work under precisely the same conditions, owned and operated by individuals and partnerships. Until some sound reason can be given why in one case there should be a liability without reference to the question whether the cause of the accident was the accident of a co-employe, while in the other case there should be no such liability, it is not seen how this law in its entirety can be held valid. It has not so far been held valid by the Supreme Court of Indiana, although it has had the question under consideration for a very considerable time.

In the case of the *P. C. C. & St. L. R'y Co.* v. *Montgomery*, cited by plaintiff in error, that Court sedulously avoids making such a decision. It says (49 N. E. 587):

"Objection is made to the validity of the act because it embraces al corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, can not be permitted to litigate the constitutionality of the

act as to other corporations. *Henderson* v. *The State*, 137 Ind. 552; *Board* v. *Reeve*, 148 Ind. 467; *Curryer* v. *Elliott*, 141 Ind. 294. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question."

This brings us face to face with the question whether a law general in its terms, applying to all corporations, will be by this Court held to be valid as to such corporations as might have been embraced in a law made specially applicable to such corporations, though invalid as to others. In other words, the question is whether such a law will be held to be enforceable by selection and construction against certain corporations, and non-enforceable as to others. It would seem upon principle that this can not be done. The effect of such a ruling is to make the law uncertain and doubtful in its application. No court, no person, can go through the list of the different kinds of business corporations operating in Indiana, and say with confidence these are amenable to the provisions of this statute and those are not.

Shall it apply to a street railroad corporation? It has in many cases been held that legislation with reference to ordinary railroads has no application to street railroad companies. The legislature of Indiana has recognized the difference between the two classes of corporations and has provided different statutes for their organization, regulation and operation.

Shall it apply to corporations engaged in the business of running steamboats, carriers by water? The dangers of such a business are not less imminent than those pertaining to railroad transportation. Shall it apply to mines, to factories and machine shops, to elevator companies, to corporations engaged in the construction of high buildings? Shall it apply to all kinds of business done by a given corporation, as for instance a corporation engaged in the dry goods trade or such parts only of its business as are hazardous? Shall it apply with reference to a railroad corporation as well to the clerks in its offices as to the brakemen and switchmen on its road?

All these are questions of practical and urgent importance which the law, as it is framed, leaves open, and which no lawyer, much more no layman, can intelligently decide.

Fortunately, however, this question, as it seems to us, has not been left an open one in this Court.

An attempt was made to have this Court apply the principle upon which the Supreme Court of Indiana rests its decision in the Montgomery case, nearly twenty-five years ago, in the case of the *United States* v. *Reese*, 92 U. S. 214, but without success. Congress was, by the fifteenth amendment, authorized to enact appropriate legislation for the enforcement of that amendment, that is to prevent discrimination against electors on account of "race, color or previous condition of servitude." An act was passed for that purpose, but its third and fourth sections were general in their terms, and were not confined in their operation to unlawful discrimination on account of "race, color or previous condition of servitude." In the particular case in hand the indictments alleged that the discrimination was in fact on account of race, being against negro electors. It was contended on behalf of the Government that upon these facts the law was enforceable in that case, because as applicable thereto the statute was within the lines of authority in the amendment. This Court, however, held otherwise and declared the law invalid, because, it was said, the Court could not attempt to enforce a law, invalid in part, by construction. The doctrine of the Montgomery case, *supra*, would have sustained that prosecution, would have said that the law was valid as against the parties indicted in that particular case, and that "it will be time enough to decide its validity as to others when any of them come before this Court with a case presenting the question." And if the principle of the Montgomery case is a correct principle, it would seem that the decision in the Reese case was indefensible.

In the case of *Baldwin* v. *Franks*, 120 U. S. 678, the doctrine of the Reese case was re-affirmed. In that case Baldwin was held in custody of the marshal on a charge of conspiracy to deprive Chinese aliens of certain rights. The statute made it an offense for two or more persons to conspire in any State for the purpose of depriving *any person or class of persons* of the equal protection of the laws, etc. It was contended that this statute was invalid because it was general and applied to any persons or class of persons, whereas it was not competent for Congress to enact such legislation for the protection of the rights of ordinary

citizens within a State, although such act, if specially directed to that subject-matter, would have been valid for the protection of the rights of aliens guaranteed by treaties. It was in that case again contended, that, as it was in fact a case of aliens deprived of rights guaranteed by treaties, the law was valid and enforcable as against the man who deprived such aliens of those rights; and that, as said in the Montgomery case, it would be time enough to hold the law invalid as to other parties when such other parties presented the question. But again this Court said that the law was general, and it could not and would not attempt to enforce it by construction as to some, when it would be compelled to deny its validity as to others plainly within the scope of its language.

So in the Trade Mark Cases, 100 U. S. 82, where the legislation was general for the purpose of protecting trade marks and punishing the counterfeiting of trade marks and the sale or dealing in counterfeit trade mark goods, it was held that, while such legislation might be valid as to such parts of the commerce of the country as was within congressional control, yet, not being limited to that, but being general in its terms, the statute could not be held to be a valid enactment.

While of course these decisions of this Court do not need the support of the decisions of any state court, yet it is not unworthy of note that the Supreme Court of Indiana has not only referred with approval to these decisions, but has itself announced the same principle.

Thus in *State ex rel Corwin v. Indiana, etc., Oil Company*, 120 Ind. 575, on page 579, that Court has said:

"To authorize the Courts to reject a part and sustain a part of a statute, the parts must be capable of separation so that each may be read by itself. Limitation by construction is not separation. *Baldwin* v. *Franks*, 120 U. S. 678; Virginia Coupon Cases, 114 U. S. 269; Trade Mark Cases, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214."

The same doctrine is stated by the same Court in *Logan* v. *Stogsdale*, 123 Ind. 372, and in the *State* v. *State ex rel*, 119 Ind. 520.

## II.

In determining whether a statute void in part shall be upheld in part, the Courts are compelled to consider, not merely whether a part of the statute may be separated from the rest and separately enforced, but also whether the law as thus separated with a part eliminated can be said to express the legislative will upon the subject. Can the Court say that the legislature would have enacted the part assumed to be valid except in connection with the other parts of the statute? What right has any Court to say that the Legislature of Indiana would have enacted this statute, as a statute applicable to steam railroads only, and exempt from its operation carriers by water, carriers by street railroads, miners, manufacturers of fire works or of gun powder, corporations using the most dangerous explosives in drilling gas wells or quarrying stone, in short any and all other corporations except, steam railroad companies, engaged in business involving extra hazard to life and limb?

In *Meshmeier* v. *The State*, 11 Ind 482, Judge Worden, speaking for the Supreme Court of Indiana, says:

> "The legislature pass an entire statute, on the supposition, of course, that it is all valid and to take effect. The Courts find some of its essential elements in conflict with the Constitution, strip it of those elements, and leave the remaining portion mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the Courts, to put it in force. The Courts have no right thus to usurp the province of the legislature."

If the language of this statute were, "that every corporation except municipal operating in this State" etc., the literary meaning and legal effect would be precisely the same as now. Would it be contended that, if invalid as a whole, it would be the duty of the Courts by selection to apply and enforce it as to some corporations and deny its enforcement as to others? But as before stated the meaning and legal effect of the statute as it stands is precisely the same as if it read "every corporation" only.

If any inference can be drawn from the fact that the statute names a railroad corporation, it would seem to be that the bill was drafted to apply to railroad corporations only; but had to be amended so as to apply to every corporation in order to be passed. Certainly it would be wholly unwarrantable to suppose that the legislature would have passed the act as applicable to railroad corporations and no others.

The fact that the Court may be of the opinion that such a statute is a proper one, as applied to a railroad corporation, is altogether immaterial.

The question is not what law would be desirable or proper, but what the law is; not what the Court thinks, but what the legislature thought, and whether such thought by appropriate action was crystalized into a valid statute.

## III.

But the suggestion that the Court strike out the provisions of the Act relating to "other corporations," and sustain it as an act applying to railroad corporations alone does not meet the needs of the case, for two reasons: In the first place the constitutional objection to the Act is not thereby removed, because it would still discriminate between railroads owned by individuals or co-partnerships or joint stock companies, (which are not corporations, *Chapman* v. *Barney*, 129 U. S. 677; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. 151), and those owned by corporations. If the railway business is to be regulated, the regulation must apply to all persons engaged in the business. It can not discriminate between corporations and other persons operating railroads under the same circumstances. Nor is it material whether this statute would apply to receivers of corporations as held in *Peirce* v. *Van Duzen*, 47 U. S. App. 339, 78 Fed. 693; contra *Burke* v. *Dillingham*, 23 U. S. App. 153, 60 Fed. 729. Under no construction can it apply to individuals or co-partnerships, *Beeson* v. *Busenbark*, 44 Kas. 669. The danger of operating railroad trains is the same whether operated by corporations or co-partnerships or individuals. While railroads are usually operated by corporations, there is nothing in the law of Indiana to prevent individuals or co-partnerships from purchasing and operating rail-

roads. It is in fact quite common for railroads to be purchased at master's sales and temporarily operated by individuals. Indeed railroad mortgages usually provide for taking possession and operating the road by a trustee in case of default in payment of interest; and, as a matter of fact, the railroad running from Indianapolis to Michigan City, was so possessed and run by General Wager Swayne, as such trustee, for several years between 1884 and 1889, and the Indiana, Decatur & Western Railroad, extending from Indianapolis to Decatur, Ills., has in like manner been operated by the trustee for years.

The other objection to the proposed judicial amendment of the statute is equally serious. It is aptly expressed in the words used by Chief Justice Waite, in *United States* v. *Reese*, 92 U. S. 214, 221, and in *Baldwin* v. *Franks*, 120 U. S. 678, 686:

> "To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one."

To enforce the statute as one passed in the exercise of the police power for the regulation of railroads, (which is what the plaintiff asks the Court to do), is not "to give effect to what appears to have been the intent of the legislature," and that, as suggested by Chief Justice Waite, in *Allen* v. *Louisiana*, 103 U. S. 80, 84, is always the test.

The legislature has not undertaken to regulate or classify *occupations*, but to classify *employers*, putting in one class corporations, other than municipal, no matter what their business, and in another class all other persons, no matter in what business engaged, even if it be that of operating a railroad. The Court is not at liberty to reject the classification thus declared by the legislature, and to enforce the statute on an entirely different basis. The question before the Court is whether the classification proposed by the legislature is valid; not whether their act could be sustained if they had declared some other classification on a wholly different basis.

In *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 84, Shaw, C. J., said:

"The same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * * But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions that are thus dependent, conditional or connected, must fall with them."

The foregoing passage is quoted with approval in *Allen* v. *Louisiana*, 103 U. S. 80, 84, Chief Justice Waite, adding:

"The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

In *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S 601, 635, 636, the income tax law of 1894 was upset because it constituted "one scheme of taxation," some of whose provisions were illegal. The Chief Justice quotes the test proposed by Mr. Justice Matthews, in *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, viz:

"To hold otherwise would be to substitute for the law intended by the legislature, one they may never have been willing by itself to enact."

But these decisions do not really touch the case at bar. We have not before us two parts of a statute, one lawfully regulating one occupation and another attempting unlawfully to regulate another occupation; but a single statute undertaking to classify employers without reference to their occupations, and the simple question is whether the classification attempted can be sustained, or whether it discriminates unlawfully.

## IV.

So far we have discussed these questions upon the theory that the statute is invalid because it discriminates against corporations as such, makes such corporations liable for acts which would not render individuals or partnerships liable under precisely the same circumstances.

We now come to the second proposition, namely, that if this act is to be taken, as the Supreme Court of Indiana has indicated, as applying separately to a railroad corporation, and is sought to be upheld as legislation against a railroad corporation specifically, without reference to other corporations, then it is invalid, because it is an unlawful discrimination against railroad corporations, as between them and other corporations and individuals, in that it makes the railroad corporation liable for damages in cases where, under precisely the same circumstances and conditions, other corporations or individuals, would not be liable. In other words the classification is an arbitrary classification of railroad corporations by name, and not a classification based upon and limited to the hazardous parts of railroad business.

Without challenging the proposition laid down in Mackey's case, 127 U. S. 205, that it is competent to legislate specially to meet special hazards and hardships, we do insist that in order to sustain the statute under consideration in that case, it is necessary to hold, as it seems to have been held in Pontius case, 157 U. S. 209, on the same statute, that it applies only to employes connected with the *operation* or peculiar hazards of the road. If the statute will bear and is to be given that construction, as was held in the Pontius case, then it may be upheld; but if it is to be construed as making the railroad company liable for an injury resulting from the negligence of one co-employe to another, without reference to the character of the occupation in which such employes were engaged, as for instance, if they were clerks in a railroad office, then it is submitted that the statute of Kansas would be invalid. An examination of the Mackey case and of the cases in which it has been cited, will disclose a marked difference in the language used in the statutes under consideration in the different cases. The statute of Kansas under consideration in the Mackey case and in the Pontius case, reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage."

That is, the statute apparently applies to all employes of railroad companies, whatever their branch of service. Literally construed, that statute would rule a case brought, as before suggested, by a clerk in one of its offices for an injury resulting from the negligence of another clerk, to the case of one employe in one of its carpenter or foundry or machine shops or in an elevator, injured by the neglect of another employe in such office, shop or running such elevator, notwithstanding such work or negligence had no connection with the dangers of operating the road, and notwithstanding employes of individuals or of other corporations would have no remedy under precisely the same circumstances.

We agree, as held in the Mackey case, that it is competent to legislate so as to protect the employes of a railroad company against the peculiar dangers incident to parts of that service.

But such legislation must be limited to such dangers.

This may be done by classification, but the classification must have reference to the hazardous occupation, and it must be reasonable.

*Gulf, etc.*, v. *Ellis*, 165 U. S. 154;
*State ex rel* v. *Hammer*, 42 N. J. L. 435.

A classification simply by name of railroad corporations does not meet this requirement.

This principle is recognized in all the other statutes, except that of Kansas, which have been reviewed by this Court.

Thus the Iowa statute involved in McLaughlin's case, 119 U. S. 566, and in Herrick's case, 127 U. S. 210, is expressly limited to cases connected with the *use and operation of the railway*. That statute reads as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employes, when such wrongs are in

any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

So the Utah statute in *Holden* v. *Hardy*, 169 U. S. 366, was not made applicable to all employes of mining companies, but to the "employment of working-men in underground mines," and to the "employment of working-men in smelters," etc., and limited the work to eight hours a day. That is, the classification was according to particular employments according to their hazards and hardships.

Suppose the classification had been simply as to "mining companies," so as to include clerks in their offices, or their ordinary employes, such as teamsters and others engaged in ordinary non-hazardous and not especially arduous work, and had then prescribed a special rule of an eight-hour day for such persons, while all others engaged in like pursuits had to work ten hours. Would the law have been held valid in such case?

We submit the entire discussion in the opinion of Mr. Justice Brown, commencing on page 393, shows that the law was upheld because the classification was according to hazard and hardship, and did not include all employes of the mining company. He says (p. 395):

"Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject can not be reviewed by the Federal Courts."

And the Supreme Court of Utah takes the same distinction, as shown in the same opinion.

So in *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693, the Ohio statute seems to be regarded by Mr. Justice Harlan, speaking for the Circuit Court of Appeals, as applying only to a particular class of employes, those subject to peculiar hazards.

It does not seem to us that the cases such as the *Railway Co.* v. *Humes*, 115 U. S. 512, and *Railway Co.* v. *Beckwith*, 129 U. S. 26, which impose penalties or liabilities upon railroad companies that fail to fence their tracks, or the *Railway Company* v. *Mathews*, 165 U. S. 1, which makes a railroad company liable for fires set by its locomotives, have any direct bearing upon this question. Such statutes are enactments *in their nature* applicable to railroads and to no other parties. The classification is a classification based upon the nature of the business, and discriminates neither against railroad companies or against any other parties, whether corporations or individuals. They are police regulations pure and simple.

It is proper further to say that in the Mackey, the Herrick, and other cases in which similar rulings have been held, the precise question which we are presenting here has not been, so far as the opinions indicate, considered by the Court. In some of these cases the statutes apply to railroad corporations alone, but it was not claimed or suggested that they contravened the fourteenth amendment, because they did not apply equally to railroads owned or operated by persons or co-partnerships. No such question was presented or decided. Nor did either of those statutes undertake to classify employers generally, distinguishing corporations from individuals and co-partnerships. As construed by this Court they classified occupations, distinguishing the operation of railroads from all other occupations, and limiting the statute even as to railroads, to injuries connected with "operation;" (Pontius case), whereas the statute of Indiana classifies, not occupations, but employers, making all employers in any occupation liable, if they happen to be corporations other than municipal, while relieving them from liability, although engaged in the same occupation and under the same circumstances, if they happen to be individuals or co partnerships. Probably one-half of the employes of a railroad company have nothing directly to dowith its operation: have no duties of a public or *quasi* public character; are not subject to special hazards, such as ticket sellers, solicitors of freight and passengers, clerks, etc., etc., yet under the Indiana statute all are included; and all employes of individuals or partnerships, how ever hazardous the work, are excluded.

As shown under Subdivision I. of this brief, where State Courts have upheld this kind of legislation it has been because it was limited to hazardous employments, not to classes of employers.

V.

But the exception of municipal corporations would also make the law invalid. Under our city charters, cities may own and run a street car system, water works, gas works, etc. In so doing a municipal corporation stands before the law just like any business corporation. In such case, and as to such property, it is submitted that it is not competent under the fourteenth amendment to discriminate in their favor as in this act. The Supreme Court of the United States has held that, as to its property interests, the United States stands like any other litigant in Court. So does any municipal corporation.

*Maximillian* v. *New York*, 62 N. Y. 160;
*Smith* v. *Rochester*, 76 N. Y. 506;
*Oliver* v. *Worcester*, 102 Mass. 489.

In conclusion, we beg to say that the recent decision of the Supreme Court of Indiana in the Montgomery case, 49 N. E. Rep. page 583, is upon the law here in question and is entitled to just so much consideration as its reasoning merits and no more.

As to the question whether a State statute is at war with the Federal Constitution, this Court judges for itself.

*Wright* v. *Nagle*, 101 U. S. 794;
*Jefferson, etc.* v. *Skelly*, 1 Black 436;
*Mobile, etc.* v. *Tennessee*, 153 U. S. 486.

That the decision in the Montgomery case is not entitled to consideration on the ground that it was a carefully considered case is patent on its face. Its logic is no better than that of the wolf in the fable. It cites as authority the case of *Bucklew* v. *Railway Co.*, 64 Iowa 611, and says:

"That decision rests largely on two decisions made upon the subject of the employer's liability act of Kansas, and that of Iowa in the Supreme Court of the United States."

It then cites *Railway Company* v. *Mackey*, 127 U. S. 205, and *Railway Company* v. *Herrick*, 127 U. S. 210, as those two decisions. Yet, singularly enough, while the Bucklew case was decided in October, 1884, neither the Mackey nor the Herrick decision was "born" until April, 1888.

Nor is the logic of the rest of this opinion of the Supreme Court of Indiana any better. It ignores the fact that the Iowa statute, by its terms and by the construction of the Iowa Court, applies only to employes connected with the "operation" of the road.

This Court having decided in the Mackey case that it is competent for the legislature to enact a law of this character applicable alone to the operation of a railroad corporation, that question needed no discussion.

What was needed, imperatively demanded, if the law was to be upheld, was a demonstration that such a law directed by name, but without regard to the nature of the employment against all railroad corporations, or against all corporations, but not against natural persons, partnerships, etc., in the same business, is valid; or some sound reason for holding that the character of the employment is immaterial, or that a statute directed against *all* corporations may be good as to some, though bad as to others.

It is submitted that neither of these requirements has been met.

It may not be improper to say that that decision will soon be under review in this Court, as we are advised it has been brought here by writ of error for reconsideration.

We respectfully ask that this statute be declared invalid.

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